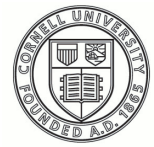

5-1-2000

State of New York Public Employment Relations Board Decisions from May 1, 2000

New York State Public Employment Relations Board

State of New York Public Employment Relations Board Decisions from May 1, 2000

Keywords

NY, NYS, New York State, PERB, Public Employment Relations Board, board decisions, labor disputes, labor relations

STATE OF NEW YORK
PUBLIC EMPLOYMENT RELATIONS BOARD

In the Matter of

LOCAL 100, TRANSPORT WORKERS UNION OF GREATER NEW YORK, AFL-CIO,

Charging Party,

- and -

CASE NO. U-20945

NEW YORK CITY TRANSIT AUTHORITY,

Respondent.

O'DONNELL, SCHWARTZ, GLANSTEIN, ROSEN, DIPRETA AND GOLDSTEIN, L.L.P. (MANLIO DIPRETA of counsel), for Charging Party

MARTIN B. SCHNABEL, VICE-PRESIDENT AND GENERAL COUNSEL (JOYCE RACHEL ELLMAN of counsel), for Respondent

BOARD DECISION AND ORDER

This case comes to us on exceptions filed by Local 100, Transport Workers Union of Greater New York, AFL-CIO (TWU), to a decision of an Administrative Law Judge (ALJ) granting respondent's, New York City Transit Authority (Authority) motion to dismiss TWU's improper practice charge alleging that the Authority violated §209-a.1(a) and (d) of the Public Employees' Fair Employment Act (Act) when it served a disciplinary notice upon a unit member, John Wagner, at his residence in violation of established past practice. Previously, as alleged in the charge, the Authority served its disciplinary notices upon a unit member on Authority premises.

The parties stipulated to the following facts:

(a) that the charge alleges that the Authority violated the past practice that employees and union representatives were served simultaneously with disciplinary action notices (DANs) at the general superintendent's office, and that in this instance, the past practice was unilaterally changed when John Wagner was served personally at his residence. The TWU was aware on February 11, 1999 that he was served that day at his residence, and the charge in this matter was filed on June 23, 1999.

(b) the allegation in the charge alleging a violation of the collective bargaining agreement (CBA) is withdrawn.[1]

It is upon the stipulated facts that the ALJ found that, on February 11, 1999, Wagner and the TWU had actual knowledge of the Authority's intention to immediately suspend Wagner and seek termination of his employment.

The Authority moved to dismiss the charge on the basis of timeliness and waiver. TWU excepts to the ALJ's determination that its charge was untimely. TWU argues that it was lulled into inaction because the Authority failed to notify it that the Authority intended to ignore the five-day appeal procedure in the CBA's grievance provision. Consequently, as a result of the Authority's unilateral change in practice, the charge was timely when measured from February 25, 1999 (the date of Wagner's employment termination) rather than February 11, 1999 (the date of Wagner's employment suspension).

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[1]See Exhibit B, Respondent's Motion to Dismiss.

Based upon our review of the record and consideration of the parties' arguments, we affirm the decision of the ALJ.

In *County of Nassau (Police Department)*,[2] we held that a motion to dismiss made to an ALJ "should not be granted without careful deliberation." Therefore, the ALJ "must assume the truth of all of the charging party's evidence and give the charging party the benefit of all reasonable inferences that could be drawn from those assumed facts".[3]

The Authority raised the defenses of timeliness and waiver. Section 204.1(a)(1) of PERB's Rules of Procedure (Rules) mandates that an improper practice charge be filed within four months of the date of the conduct which is the subject of the charge.

The TWU relies upon our decision in *Middle Country Teachers Association (Werner)* (hereafter *Middle Country*),[4] for support of its exceptions. The TWU, however, has misinterpreted our decision in *Middle Country*. TWU argues that the date of actual injury (February 25, 1999) is the operative date which commences the running of the four-month limitation period found in our rule §204.1(a)(1).

We have determined that "[i]n the context of a unilateral change allegation, the legal injury is to the union only and injury/implementation occurs when the change is made. Nothing in *Middle Country* suggests that notification cannot coincide with

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[2]17 PERB ¶3013, at 3030 (1984).

[3]*Id.*

[4]21 PERB ¶3012 (1988).

injury/implementation . . . ."[5] Here, the parties' stipulation acknowledges that the TWU, on February 11, 1999, was served simultaneously with the DAN that John Wagner received at his home instead of the workplace. It is this change in the place of service of the DAN that formed the basis of TWU's §209-a.1(d) charge, as stipulated. Consequently, on February 11, 1999, the TWU was on notice of the alleged unilateral change in the Authority's practice but, nevertheless, sat on its rights until June 23, 1999.[6]

Based upon the foregoing, we deny TWU's exceptions and we affirm the ALJ's decision.

IT IS, THEREFORE, ORDERED that the charge be, and hereby is, dismissed.

DATED: May 1, 2000
Albany, New York

Michael R. Cuevas, Chairman

Marc A. Abbott, Member

John T. Mitchell, Member

[5]*City of Oswego*, 23 PERB ¶3007, at 3018 (1990); *see also Public Employees Fed'n (Levy)*, 31 PERB ¶3090 (1998).

[6]Upon this record, we find no evidence of interference to support a violation of §209-a.1(a).

STATE OF NEW YORK
PUBLIC EMPLOYMENT RELATIONS BOARD

In the Matter of

PUBLIC EMPLOYEES FEDERATION, AFL-CIO,

Charging Party,

- and - **CASE NO. U-18291**

STATE OF NEW YORK,

Respondent.

WILLIAM P. SEAMON, GENERAL COUNSEL (STEVEN M. KLEIN of counsel), for Charging Party

WALTER J. PELLEGRINI, GENERAL COUNSEL (MAUREEN SEIDEL *of counsel*), *for* Respondent

BOARD DECISION AND ORDER

This case comes to us on exceptions filed by the Public Employees Federation, AFL-CIO (PEF), to a decision of an Administrative Law Judge (ALJ) dismissing its improper practice charge alleging, *inter alia*, that the State of New York (Office of the State Inspector General) (State) had violated §209-a.1(d) of the Public Employees' Fair Employment Act (Act) when the Governor issued Executive Order No. 39 (hereinafter referred to as EO-39) requiring employees of all State executive branch agencies to report to the State Inspector General any information regarding misconduct by way of corruption, fraud, criminal activity, etc. The failure to report such activity forms the basis for disciplinary action.

PEF also alleged in its charge that prior to EO-39, there was no such reporting requirement. Thus, EO-39 imposed a new work rule which changed the terms and conditions of employment of its unit members.

The State, in its Answer, alleged that there has been no change in work rules because the reporting requirement has either been an explicit or implicit rule that has been followed within the agencies. The State does not deny that it did not negotiate the implementation of EO-39 with PEF.

A hearing was held on May 19, 1999, during which the State moved to dismiss PEF's charge at the close of PEF's direct case. The ALJ reserved decision on the motion and the State proceeded to put on its direct case. Upon review of the evidence produced by PEF, the ALJ granted the State's motion and dismissed PEF's charge.

PEF excepts to the ALJ's determination and contends that:

(a) EO-39 was a new reporting requirement with a disciplinary component and, therefore, its promulgation by the State changed terms and conditions of employment for PEF-represented employees.

(b) The ALJ's conclusion that since the prior executive orders contained no reporting requirement, PEF had to prove the existence of a negative, i.e., prove no prior practice of reporting existed in order to survive a motion to dismiss, is in error.

(c) The ALJ granted the motion without considering any of the record developed during the State's case.

FACTS

On June 17, 1996, Governor George Pataki issued EO-39, which revoked prior Executive Order 103 and broadened the scope of the Office of the State Inspector General. As part of EO-39, "[E]very state officer or employee in a covered agency shall report promptly to the State Inspector General any information concerning corruption, fraud . . . etc." EO-39 also contained a disciplinary provision for the knowing failure to comply.

On October 16, 1996, PEF filed an improper practice charge alleging the issuance of EO-39 without prior negotiation violated §209-a.1(d) of the Act. The State's Answer contends that there has been no change in the work rule that required employees to report instances of wrongdoing to their employer.

A hearing took place on May 19, 1999. At the hearing, counsel for PEF and the State introduced into the record as joint exhibits EO-39 and three prior executive orders all entitled "Establishing the Office of the State Inspector General", as well as, the last collective bargaining agreement between PEF and the State.[1] Counsel for PEF rested upon "the introduction and admission of Joint Exhibits 1 and 2."[2] Counsel for the State moved to dismiss the charge and the ALJ reserved decision on the motion. The State called its first and only witness, at which point, PEF objected on the grounds of relevancy.[3] The ALJ overruled PEF's objection and the State's witness testified.

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[1]Transcript pp. 3-4.

[2]Transcript p. 5 [Joint 1 (EO-39); Joint Exhibit 2 (EO-103 dated October 14, 1987)].

[3]Transcript p. 6.

During cross-examination of the State's witness, certain documents were identified and, by stipulation, these documents were received as rebuttal evidence in PEF's case.[4] The State rested and PEF called no rebuttal witnesses.[5] It is upon this record that the ALJ decided to dismiss PEF's improper practice charge.

DISCUSSION

Historically, we departed from the NLRB enforcement model and left the responsibility for presenting an improper practice case to the charging party.[6] As a result, we have developed our own precedents to guide our decisions.

In this context, we have established precedents regarding the charging party's burden of proof.[7] Our interpretation of the Taylor Law and our Rules of Procedure have been given great deference by the courts.[8] It has been determined that we are the court of original jurisdiction in an [improper] practice charge.[9] We have held that a charge will

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[4]Transcript p. 32 [identified in the record as charging party Exhibit 1].

[5]Transcript p. 33.

[6]Donovan, Ronald, *Administering the Taylor Law: Public Employee Relations in New York*, ILR Press (1990), p. 179.

[7]*County of Nassau (Police Dep't)*, 17 PERB ¶3013 (1984).

[8]*New York City Transit Auth. v. PERB*, 147 AD2d 574, 22 PERB ¶7001 (2d Dep't 1989), *amended*, 156 AD2d 689, 23 PERB ¶7002 (2d Dep't 1989), *appeal dismissed,* 78 NY2d 1122, 24 PERB ¶7018 (1991). (Court approved of PERB's use of the CPLR definition of affirmative defense because of the adversarial nature of improper practice proceedings).

[9]*See Odessa-Montour Cent. Sch. Dist. v. PERB*, 228 AD2d 892, 29 PERB ¶7009 (3d Dep't 1996); *Deposit Cent. Sch. Dist. v. PERB*, 214 AD2d 288, 28 PERB ¶7013 (3d Dep't 1995), *motion for leave to appeal denied*, 88 NY2d 866, 29 PERB ¶7007 (1996).

be dismissed if a charging party has not sustained its burden of proof.[10] No further hearings need be held where the evidence presented by the charging party does not set forth a *prima facie* case.[11] [12] It is well established in a §209-a.1(d) charge that [the charging party] has the burden of proof to establish by a preponderance of the reliable evidence that a change in the past practice had, in fact, occurred[13] Consequently, if the charging party fails to prove an essential element of the charge, the case will be dismissed.[14] Furthermore, the charging party cannot rely upon cross-examination of the respondent's witnesses to establish a *prima facie* case.[15]

We have previously established a standard of proof within which to judge the merits of a motion to dismiss. We have held that with respect to "a motion made to [an ALJ] to dismiss a charge after the presentation of charging party's evidence . . . [w]e would reverse [an ALJ's] decision to grant such a motion unless we could conclude that

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[10]*Whitesboro Cent. Sch. Dist.*, 14 PERB ¶3039 (1981).

[11]*County of Nassau (Police Dep't)*, *supra* note 7.

[12]*Suffolk County BOCES III*, 25 PERB ¶3020, at 3041 (1992), "[W]e do not investigate a party's allegations, even those over which we have jurisdiction. It is the charging party's obligation to plead and prove a case and to do whatever investigation is considered necessary."

[13]*County of Nasau*, 31 PERB ¶4612 (1998); *County of Nassau*, 28 PERB ¶4662 (1995); *Plainview-Old Bethpage Cent. Sch. Dist.*, 27 PERB ¶4632 (1994).

[14]*See Professional Staff Congress and City Univ. of New York*, 23 PERB ¶3030 (1990); *SUNY (Buffalo)*, 23 PERB ¶4582 (1990).

[15]*Nanuet Union Free Sch. Dist. and Nanuet Teachers Ass'n*, 17 PERB ¶3005 (1984).

the evidence produced by the charging party, including all reasonable inferences therefrom, is plainly insufficient even in the absence of any rebuttal ...."[16]

Turning to the merits, in affirming the ALJ's determination to dismiss PEF's charge, the question is whether PEF in its direct case has demonstrated a change in work rules.

PEF alleged in its charge that prior to the Governor issuing EO-39, there was no legal, statutory or administrative requirement that PS&T unit employees comply with the reporting requirement contained in EO-39,[17] that the reporting requirement allegedly imposed a new work rule,[18] and that this new work rule constituted a change in the terms and conditions of employment for all PS&T unit employees.[19] Lastly, PEF alleged that the State, through GOER, did not negotiate this new work rule prior to its implementation.[20]

PEF had the burden to demonstrate by a preponderance of the evidence that a change in work rules had occurred, but the record in PEF's case is devoid of any evidence that demonstrated the working conditions that existed prior to the implementation of EO-39. PEF chose to limit its proof to the two executive orders. If we were to assume that these two documents represented the best evidence of the

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[16] *County of Nassau (Police Dep't)*, *supra* note 7, at 3029-30.

[17] ¶16 Improper Practice charge.

[18] ¶7 Improper Practice charge.

[19] ¶8 Improper Practice charge.

[20] ¶9 Improper Practice charge.

circumstances surrounding the reporting requirement, PEF has missed the point. It is PEF that has alleged the change and must demonstrate the conditions that existed prior to the implementation of EO-39. This is a question of fact which exists independently of the executive orders.[21]

We have endorsed the application of the parol evidence rule in our proceedings in appropriate circumstances to explain the contents of a writing.[22] PEF failed to call any witness who would have knowledge of the working conditions of PEF unit members, i.e., any reporting requirement, prior to the issuance of EO-39. Furthermore, such a witness may have been able to explain whether EO-39 represented a change in conditions of employment from those that existed under EO-103. There is, therefore, no evidence in the record up to the point at which the motion to dismiss was made to vary the terms of EO-103 or to explain a practice which may have developed with respect to the reporting requirements. These essential facts were still in dispute at the close of PEF's direct case.

PEF also excepts on the ground that the ALJ granted the State's motion without considering any of the record developed during the State's case. In support of this argument, PEF relies on our decision in *Incorporated Village of Rockville Centre* (hereafter *Rockville Centre*).[23] PEF's reliance on *Rockville Centre* is misplaced. The

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[21]*Richardson on Evidence*, §572, at p. 581 (Jerome Prince, ed.,10th ed. 1973).

[22]*Village of Port Chester*, 18 PERB ¶3058 (1985). See *also Town of Callicoon*, 70 NY2d 907, 21 PERB ¶7501 (1987) (arbitrator's reliance on "past practice" clause and parol evidence was not completely irrational).

[23]28 PERB ¶3056 (1995).

ALJ in *Rockville Centre* adjourned the hearing *sine die* after the respondent moved to dismiss at the close of the charging party's direct case. Obviously, the only record available to the Board in reaching its decision to reverse the determination of the ALJ was the charging party's direct case.

Indeed, *Rockville Centre* stands for exactly the same proposition that we hold here: when deciding a motion to dismiss at the close of the charging party's case, the motion succeeds or fails on the evidence of the charging party's direct case alone. *Rockville Centre* differs from this case only in that the charging party met its burden of proving a *prima facie* case on its direct case. Here it did not. It is for these reasons that *Rockville Centre* is factually and legally distinguishable.

We are constrained by our precedents to consider only the charging party's direct case when a motion to dismiss has been made.[24] Furthermore, PEF cannot rely upon the cross-examination of the State's witness to establish its *prima facie* case. Here, PEF has pled certain affirmative facts which it failed to prove in its direct case through the use of independent evidence.[25] Consequently, PEF is not entitled to a new hearing merely because it was mistaken as to the elements it was required to prove. [26]

Based upon the foregoing, we hereby deny PEF's exceptions in their entirety and affirm the decision of the ALJ.

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[24]*County of Nassau, (Police Dep't), supra* note 7.

[25]*City of Yonkers*, 10 PERB ¶3020 (1977).

[26]*Id.*

IT IS, THEREFORE, ORDERED that the charge herein be, and it hereby is, dismissed.

DATED: May 1, 2000
Albany, New York

Michael R. Cuevas, Chairman

Marc A. Abbott, Member

John T. Mitchell, Member

STATE OF NEW YORK
PUBLIC EMPLOYMENT RELATIONS BOARD

In the Matter of

ADMINISTRATORS ASSOCIATION OF ERIE COMMUNITY COLLEGE, LOCAL 3300, UAW, REGION 9,

Petitioner,

- and -

CASE NO. CP-549

COUNTY OF ERIE AND ERIE COMMUNITY COLLEGE,

Employer.

CHIACCHIA & FLEMING (ANDREW P. FLEMING of counsel), for Petitioner

BRIAN D. DOYLE, ESQ., for Employer

BOARD DECISION AND ORDER

This case comes to us on exceptions filed by the Administrators Association of Erie Community College, Local 3300, UAW, Region 9 (Association) to a decision of an Administrative Law Judge (ALJ) dismissing its unit placement petition which sought to place the title of Academic Dean in its unit. The ALJ determined that the Academic Deans were sufficiently engaged in policy-making on behalf of their joint employer, the County of Erie (County) and Erie Community College (College), to preclude their placement in the Association's unit.

The ALJ determined that the Academic Deans formulate policy on a College-wide basis in their respective areas and that they are managerial because they play a

key role in curriculum development, effectively determining the educational complexion of the College.

The Association argues in its exceptions to the ALJ's decision that the ALJ erred factually and legally in her analysis of the case because there are presently included in its bargaining unit titles that are as managerial if not more so than the Academic Deans. The County/College has not responded to the exceptions.

Based upon our review of the record and consideration of the Association's arguments, we affirm the decision of the ALJ.

FACTS

In 1985, the College and the Association entered into an agreement by which the title of Campus Academic Dean was deemed by the parties to be managerial/confidential and that any employees appointed to fill the position upon the vacancy of the position would thereafter be excluded from the bargaining unit. At that time, the three Campus Academic Deans had responsibilities with respect to each one of the three College campuses to which they were assigned.[1] The Deans reported directly to the Vice-President of Academic Affairs and indirectly to the College President. They had general curriculum responsibilities in all program areas for their campus, budget responsibilities, and they supervised and evaluated certain administrators.

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[1]The College consists of three campuses: North Campus, South Campus and City Campus.

In 1994, the College's reorganization became effective. The Campus Academic Deans became Academic Deans with College-wide program responsibilities: Academic Dean of Allied Health and Technologies, Academic Dean of Liberal Arts and Academic Dean of Business and Public Service. Their duties included the supervision and direction of their program curriculum, evaluation of the curriculum, attendance at advisory board meetings, faculty evaluation and budgetary responsibilities.

DISCUSSION

The Association argues in its exceptions that the Academic Deans share a community of interest with other titles in its bargaining unit, such as the Executive Dean of Development and Community Services, Dean of Students, Director of Athletics, Director of Budget, Registrar, Dean of Student Development and Dean of Retention Services, among others, that warrants their placement in the unit. The Association concedes in its exceptions that the Academic Deans are responsible for policy formulation, but argues that because so many of the titles it represents formulate college-wide policy, the Academic Deans share a community of interest with titles in the bargaining unit which warrants their placement in the Association's unit.

In *County of Rockland*,[2] we reiterated the standards to be utilized in a petition seeking to represent unrepresented employees when the employer argues that certain employees be excluded from the proposed unit because of their managerial or confidential duties. We there noted (at 3141-42):

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[2]28 PERB ¶3063 (1995).

> In determining whether a public employee should be deprived of representation rights, in either the context of a managerial/confidential application or a representation petition, we are controlled by the criteria set forth in the Act (footnote omitted), as interpreted and applied in our decisions:
>
> > The first criterion for managerial designation is "Policy formulation." An employee who either individually selects from among options those which are to be the objectives of a public employer in fulfilling its mission, and the methods and extent of meeting those objectives, or who regularly participates in the essential process resulting in such decisions, formulates policy within the meaning of the Act. A person who participates in that process in a clerical or advisory role or as a resource person does not satisfy that criterion.

Clearly, the Academic Deans here meet the criteria for managerial employees who formulate policy.[3] The Association concedes the managerial status of the Academic Deans, but argues that because of a community of interest with other employees in the unit that the Academic Deans should be placed in its bargaining unit. In deciding a unit placement petition, community of interest is but one factor to be considered. We also look to job descriptions, civil service job specifications, the duties actually performed, and the public employer's placement, or nonplacement, of the title in a unit of represented employees.[4] That the Association may represent other employees who may be managerial employees within the meaning of the Act does not compel, or even support, the placement of these clearly managerial employees in its bargaining unit.

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[3]*Clinton Community Coll.*, 31 PERB ¶3070 (1998). *See also County of Rensselaer (Hudson Valley Community. Coll.)*, 17 PERB ¶4060 (1984), *aff'd*, 18 PERB ¶3001 (1985).

[4]*County of Rockland*, *supra* note 2.

Based on the foregoing, the Association's exceptions are denied and the decision of the ALJ is affirmed.

IT IS, THEREFORE, ORDERED that the petition must be, and it hereby is, dismissed.

DATED: May 1, 2000
Albany, New York

Michael R. Cuevas, Chairman

Marc A. Abbott, Member

John T. Mitchell, Member

STATE OF NEW YORK
PUBLIC EMPLOYMENT RELATIONS BOARD

In the Matter of

WESTCHESTER COUNTY CORRECTION OFFICERS BENEVOLENT ASSOCIATION, INC.,

Charging Party,

- and -

CASE NO. U-20707

COUNTY OF WESTCHESTER,

Respondent.

GOODSTEIN & WEST (ROBERT DAVID GOODSTEIN of counsel), for Charging Party

ALAN D. SCHEINKMAN, COUNTY ATTORNEY (LORI A. ALESIO of counsel), for Respondent

BOARD DECISION AND ORDER

This case comes to us on exceptions to a decision of an Administrative Law Judge (ALJ) who found a violation of §209-a.1(d) of the Public Employees' Fair Employment Act (Act) by the County of Westchester when it changed its prior practice and began withholding income tax on a bi-weekly basis from individual correction officers whose Workers' Compensation and General Municipal Law (GML) §207-c claims were controverted. The County denied any violation of the Act and alleged, by way of an affirmative defense, that tax withholding under the circumstances of controverted disability claims is not a mandatory subject of bargaining.

In lieu of a hearing, the parties submitted a stipulated record and filed briefs.

FACTS

The Stipulation of Facts is as follows:

1. Pursuant to a letter opinion of the Internal Revenue Service, from approximately January 1, 1992 through February 1999, the COUNTY did not withhold income tax from the bi-weekly wages and salaries of correction officers presently on correction officer compensation (Workers' Compensation and General Municipal Law §207-c) even if an officer's entitlement to said compensation was controverted.

2. Unilaterally, and without negotiations with the union, on or about February 11, 1999 the COUNTY determined that it would begin withholding income tax on a bi-weekly basis from individual correction officers when it "controverted" their claims.

3. Pursuant to the annexed IRS letter ruling, the COUNTY employer has the discretion to either withhold income tax bi-weekly and reimburse correction officers at the end of the calendar year, or to issue bi-weekly pay checks without withholding.

4. Although the COUNTY began on or about February 11, 1999 withholding income tax from other correction officers whose claims were not controverted, it acknowledged that this was in error.

5. However, although it prospectively corrected said error, the other correction officers whose monies were withheld have not been retroactively reimbursed as of this date.

6. Further, in March 1999, the COUNTY proceeded to withhold income tax from other individual members of COBA's bargaining unit on correction officer compensation, without negotiation with the union, claiming the cases were controverted. Again, although some of these withholdings were credited to "error" by the COUNTY, to date, the remaining correction officers have not been reimbursed for monies withheld without negotiations.

DISCUSSION

The Stipulation of Facts paraphrases the contents of the improper practice charge filed by the Westchester County Correction Officers Benevolent Association, Inc. (COBA).

COBA is alleging a unilateral change in a past practice. Under the Act, a past practice must concern a mandatory subject of bargaining.[1] It is axiomatic under the Act that public employees through their employee organizations bargain with their public employers over the terms and conditions of employment.[2] Salaries and wages are by definition terms and conditions of employment[3] and, therefore, a mandatory subject of bargaining.[4]

The parties' stipulation demonstrates that the County, relying upon an opinion letter from the Internal Revenue Service (IRS), did not withhold income tax from the wages and salaries of correction officers receiving disability compensation (Worker's Compensation and/or GML §207-c) even if the claim was controverted.[5] This practice

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[1]*Farmingdale Union Free Sch. Dist.*, (hereafter *Farmingdale*), 7 PERB ¶3056 (1974).

[2]Act, §203.

[3]Act, §201.4.

[4] *Plainedge Fed'n of Teachers*, 31 PERB ¶3015 (1998); *Patrolmen's Benevolent Ass'n of Newburgh, New York, Inc.*, 30 PERB ¶3007 (1997); *Unatego Nonteaching Ass'n v. PERB*, 134 AD2d 62, 21 PERB ¶7002 (3d Dep't 1987), *motion for leave to appeal denied,* 71 NY2d 805, 21 PERB ¶7010 (1988).

[5]¶1 of Stipulation of Facts (since neither party relies upon a collective bargaining agreement or any other collectively negotiated procedure as a source of right for this conduct, we shall for the purposes of this decision consider this to be a practice).

went on for several years, commencing on or about January 1, 1992 through February 1996.[6]

We have established the criteria a charging party must prove to establish a *prima facie* case that a violation of a past practice has occurred. In *Farmingdale*, we held that to prove an improper unilateral change in a term and condition of employment which is not defined by written agreement between the parties, it is the burden of "the charging party to establish that there was an established past policy [or practice] which was changed . . . ."[7] It is well settled that in order to demonstrate the existence of a past practice, a charging party must prove that the practice "was unequivocal and was continued uninterrupted for a period of time sufficient under the circumstances [footnote omitted] to create a reasonable expectation among the affected employees that the [practice] would continue."[8] If such a practice is found to exist, the employer is not privileged to change such practice without first negotiating with the union.[9]

The County in its exceptions and brief argues that the IRS opinion letter gives it the discretion to withhold certain taxes from the salary or wages of disabled correction officers and, therefore, the act of withholding taxes is not a mandatory subject of bargaining. We disagree.

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[6]See note 5 *supra*.

[7]*Farmingdale*, *supra* note 1, at 3092.

[8]*County of Nassau*, 24 PERB ¶3029, at 3058 (1991).

[9]*County of Nassau*, 13 PERB ¶3095 (1980), *conf'd,* 14 PERB ¶7017 (Sup. Ct. Nassau County 1981), *aff'd*, 87 AD2d 1006, 15 PERB ¶7012 (2d Dep't 1982), *motion for leave to appeal denied*, 57 NY2d 601, 15 PERB ¶7015 (1983).

While we have not previously decided this issue, we have held that unilaterally implementing a procedure under which an employer deducted pay of unit members violated §209-a.1(d) of the Act.[10] We have held that "[w]ages are a term and condition of employment that cannot be changed without negotiations . . . . [D]eductions in salary, lump sum pay, the method of calculating pay, the date on which employees are to be paid, and retroactivity are mandatorily negotiable." [11]

The County also argues in its exceptions that the manner of payment to disabled correction officers is governed by the GML, and in addition, that its unilateral action of withholding taxes is not a term or condition of employment that is subject to negotiation. For the reasons previously discussed, these exceptions lack merit. The authorities cited in the County's exceptions and brief are factually and legally distinguishable. In *Leirer v. Caputo*,[12] the Court of Appeals held that the County Treasurer improperly recouped certain overpayments made to an employee after conducting an audit. It was held in *City of Albany*[13] that recoupment is mandatorily negotiable. The issue in *Webster Central School District v. PERB*[14] dealt with whether the school district's decision to contract with BOCES for services was mandatorily negotiable. The Court

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[10]*City of Albany*, 23 PERB ¶4531, *exceptions dismissed,* 23 PERB ¶3027 (1990).

[11]*Id.* at 4571. *See County of Orange*, 12 PERB ¶3114 (1979), *conf'd*, 76 AD2d 878, 13 PERB ¶7009 (2d Dep't 1980) *motion for leave to appeal denied*, 51 NY2d 703, 13 PERB ¶7013 (1980); *County of Monroe*, 10 PERB ¶3104 (1977); *Lynbrook PBA*, 10 PERB ¶3067 (1977). *See also City of Newburgh*, 20 PERB ¶3017 (1987).

[12]81 NY2d 455 (1993).

[13]*Supra* note 10.

[14]75 NY2d 619, 23 PERB ¶7013 (1990).

decision to contract with BOCES for services was mandatorily negotiable. The Court answered this in the negative because it was a matter of statutory construction resolved by a 1984 amendment to the BOCES statute clearly evidencing the Legislature's intent. The issue in *Schenectady Police Benevolent Association v. PERB*[15] dealt with statutory construction of GML §207-c. The Court of Appeals held that a direction to a disabled officer to perform light duty or undergo medical treatment was not mandatorily negotiable. There is no corresponding express language in GML §207-c giving the employer the discretion or requiring an employer to withhold taxes from a disabled officer's wages. In *City School District of the City of New Rochelle*,[16] the school district reduced services by cutting the budget. This was obviously a management prerogative.

In the instant improper practice charge, the County stipulated that it did not withhold income tax from disabled officers' wages for over seven years. During that time, it never gave COBA any indication that there was a mistake or that it intended to cease the practice.

The County's argument that its discretion was unfettered because of the IRS opinion letter is misplaced. The IRS opinion letter was not mandatory and provided the County with an alternative which it followed for over seven years. Consequently, the County's duty to bargain prior to the change in practice was not pre-empted by the IRS opinion letter or by any statutory construction. The County had the discretion to choose

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[15]85 NY2d 480, 28 PERB ¶7005 (1995).

[16]4 PERB ¶3060 (1971).

whether to withhold income tax from controverted claims. We have held that the exercise of discretion is generally subject to a duty to bargain.[17]

Based on the foregoing, we deny the County's exceptions and affirm the decision of the ALJ.

IT IS, THEREFORE, ORDERED that the County:

1. Immediately revert to the method of handling income tax withholding which existed prior to February 11, 1999, for correction officers whose Workers' Compensation and GML §207-c claims are being controverted;
2. Immediately make all employees whole for any wages and benefits lost as a result of the change in method of handling income tax withholding from the date of that change until reversion to the prior method, with interest at the maximum legal rate;

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[17]*Bd. of Educ. of the City Sch. Dist. of the City of New York*, 18 PERB ¶4621 (1984), *aff'd*, 19 PERB ¶3015 (1985), *conf'd sub nom. Bd. of Educ. of the City Sch. Dist of the City of New York v. PERB*, 21 PERB ¶7001 (Sup. Ct. Albany County 1988), *rev'd*, 147 AD2d 70, 22 PERB ¶7014 (3d Dep't 1989), *rev'd*, 75 NY2d 660, 23 PERB ¶7012 (1990).

3. Sign and post the attached Notice at all locations ordinarily used to communicate with unit employees.

DATED: May 1, 2000
Albany, New York

Michael R. Cuevas, Chairman

Marc A. Abbott, Member

John T. Mitchell, Member

NOTICE TO ALL EMPLOYEES

PURSUANT TO
THE DECISION AND ORDER OF THE

NEW YORK STATE
PUBLIC EMPLOYMENT RELATIONS BOARD

and in order to effectuate the policies of the

NEW YORK STATE
PUBLIC EMPLOYEES' FAIR EMPLOYMENT ACT

we hereby notify all employees of the County of Westchester (County) in the unit represented by the Westchester County Correction Officers Benevolent Association, Inc. that the County will:

1. Immediately revert to the method of handling income tax withholding which existed prior to February 11, 1999, for correction officers whose Workers' Compensation and GML §207-c claims are being controverted;

2. Immediately make all employees whole for any wages and benefits lost as a result of the change in method of handling income tax withholding from the date of that change until reversion to the prior method, with interest at the maximum legal rate.

Dated . . . . . **By** . . . . . .
(Representative) (Title)

COUNTY OF WESTCHESTER

. . . . . .

This Notice must remain posted for 30 consecutive days from the date of posting, and must not be altered, defaced, or covered by any other material.

STATE OF NEW YORK
PUBLIC EMPLOYMENT RELATIONS BOARD

In the Matter of

JOHN THOMAS MCANDREW,

Charging Party,

- and - **CASE NO. U-21054**

PORT JERVIS CITY SCHOOL DISTRICT,

Respondent.

JOHN THOMAS MCANDREW, *pro se*

CUDDEBACK & ONOFRY (ROBERT A. ONOFRY of counsel), for Respondent

BOARD DECISION AND ORDER

This case comes to us on exceptions filed by John Thomas McAndrew to a decision of the Assistant Director of Public Employment Practices and Representation (Assistant Director) dismissing his improper practice charge alleging that the Port Jervis City School District (District) violated §§209-a.1(a) and (c) of the Public Employees' Fair Employment Act (Act) when the Superintendent of Schools refused to meet with him to discuss his concerns about the Superintendent's conduct of an election to choose a delegate and an alternate to the annual meeting of the New York State Teachers' Retirement System (Retirement System).

A hearing was held before the Assistant Director with McAndrew appearing *pro se* and the District represented by counsel. At the close of McAndrew's narrative

testimony, the District moved to dismiss McAndrew's charge for failure of proof. The Assistant Director closed the record and advised the parties that they would be afforded the opportunity to file briefs on the motion once the transcript for the hearing was received. The Assistant Director thereafter notified the parties that he had received the transcript and that briefs could be filed on the motion. Only McAndrew responded.

The Assistant Director dismissed McAndrew's charge, finding that the election for a delegate to the Retirement System did not arise from or relate to the employer-employee relationship between the Superintendent and McAndrew. As a result, the Assistant Director held that McAndrew had not established the violations alleged.

McAndrew excepts to the Assistant Director's decision, arguing that an employer-employee relationship exists with respect to the delegate election and that the Superintendent discriminated against him, in violation of District policy and practice, by refusing to meet with him when he had met with another unit member involved in the same election. The District has not filed a response to the exceptions.

Having reviewed the record and considered McAndrew's arguments, we affirm the decision of the Assistant Director.

FACTS

Section 505 of the New York State Education Law provides that the Superintendent of Schools is the chief administrative officer of a territorial unit responsible for conducting elections for delegates and alternates to the Retirement System annual convention. McAndrew was a candidate in the 1999 election. He requested a meeting with the Superintendent to discuss his concerns about the conduct

of the election. McAndrew testified that the Superintendent refused to meet with McAndrew, stating that "I'm not interested in discussing this. I am in charge. I run the election." McAndrew further testified that it was his belief that the Superintendent had met with the other candidate in the election and that the Superintendent refused to meet with him because McAndrew had filed several previous improper practice charges, three of which resulted in the District being found by PERB to have violated the Act.[1] It was McAndrew's testimony that the Superintendent had animus against him because he prevailed in these charges.

DISCUSSION

In *City of Salamanca*,[2] we outlined the respective burdens in cases involving allegedly improperly motivated actions:

> In order to establish such improper motivation, a charging party must prove that he had been engaged in protected activities, and that the respondent had knowledge of and acted because of those activities. [Footnote omitted] If the charging party proves a *prima facie* case of improper motivation, the burden of persuasion shifts to the respondent to establish that its actions were motivated by legitimate business reasons. [Footnote omitted]

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[1]*See Port Jervis City Sch. Dist.*, 32 PERB ¶4545 (1999); *Port Jervis Teachers Ass'n and Port Jervis City Sch. Dist.*, 28 PERB ¶4673 (1995); *Port Jervis City Sch. Dist.*, 24 PERB ¶3031 (1991). *See also Port Jervis Teachers Ass'n*, 22 PERB ¶3021, *conf'd*, 22 PERB ¶7021 (Sup. Ct. Orange County 1989); *Port Jervis City Sch. Dist.*, 22 PERB ¶3022 (1989); *Port Jervis Teachers Ass'n*, 19 PERB ¶3038 (1986); *Port Jervis Teachers Ass'n*, 18 PERB ¶3044 (1988); *Port Jervis City Sch. Dist.*, 18 PERB ¶4561 (1988); *Port Jervis City Sch. Dist.*, 18 PERB ¶4560 (1988), where McAndrew's improper practice charges against the District and/or the Association were dismissed.

[2]18 PERB ¶3012, at 3027 (1985).

McAndrew meets the first two prongs of the test because he has a history of filing improper practice charges against both the District and his bargaining agent and the Superintendent is aware of McAndrew's protected activities. However, the record is devoid of any evidence of improper motivation on the part of the Superintendent with respect to his alleged refusal to meet with McAndrew to discuss the Retirement System election. McAndrew points to prior improper practice charges which he filed against the District and in which he prevailed as evidence of the Superintendent's animus. Although the parties' labor relations history, including evidence of an employer's animus, is properly considered as a factor in determining whether an action was improperly motivated, such evidence is merely one factor among several that must be considered. Proof of a contentious labor history is not conclusive evidence that all acts taken within the context of that relationship are always, or even necessarily, improperly motivated.[3]

There is no other record evidence of any animus on the part of the District, only McAndrew's testimony that he believes that the District is improperly motivated against him because he files improper practice charges and grievances against it. McAndrew's subjective belief is insufficient proof of animus to support a finding of a violation of §§209-a.1(a) and (c) of the Act.[4]

Further, as found by the Assistant Director, the Superintendent was not acting in his capacity as the chief executive officer of the District when he refused to meet with

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[3]*See Town of Henrietta*, 28 PERB ¶3079 (1995); *Erie County Water Auth.*, 27 PERB ¶3010 (1995).

[4]*See State of New York - Unified Ct. Sys.*, 27 PERB ¶3012 (1994)

McAndrew but as the chief administrative officer of the territorial district as designated by §505 of the Education Law. Any improprieties which may be involved in the election or the Superintendent's action in relation to the election are appropriately addressed in a different forum.[5] As the Superintendent's refusal did not arise from or affect the employer-employee relationship, the Superintendent's action does not violate the Act.[6]

Based on the foregoing, McAndrew's exceptions are denied and the decision of the Assistant Director is affirmed.

IT IS, THEREFORE, ORDERED that the charge must be, and it hereby is, dismissed.

DATED: May 1, 2000
Albany, New York

Michael R. Cuevas, Chairman

Marc A. Abbott, Member

John T. Mitchell, Member

[5]McAndrew has filed an appeal with the Commissioner of Education.

[6]*See Bd. of Educ. of the City Sch. Dist. of the City of New York*, 15 PERB ¶3136 (1982). *See also Town of Newark Valley and Lawrence Kasmarcik, Highway Superintendent*, 16 PERB ¶4621, *aff'd on other grounds*, 16 PERB ¶3102 (1983), *petition to set aside dismissed*, 17 PERB ¶7005 (Sup. Ct. Tompkins County 1984); *Town of Santa Clara*, 15 PERB ¶4630 (1982), *aff'd on other grounds*, 16 PERB ¶3014 (1983).

STATE OF NEW YORK
PUBLIC EMPLOYMENT RELATIONS BOARD

In the Matter of

UNITED PUBLIC SERVICE EMPLOYEES UNION,

Petitioner,

-and-

CASE NO. C-4918

CITY OF AMSTERDAM,

Employer.

CERTIFICATION OF REPRESENTATIVE AND ORDER TO NEGOTIATE

A representation proceeding having been conducted in the above matter by the Public Employment Relations Board in accordance with the Public Employees' Fair Employment Act and the Rules of Procedure of the Board, and it appearing that a negotiating representative has been selected,

Pursuant to the authority vested in the Board by the Public Employees' Fair Employment Act,

IT IS HEREBY CERTIFIED that the United Public Service Employees Union has been designated and selected by a majority of the employees of the above-named public employer, in the unit found to be appropriate and described below, as their exclusive representative for the purpose of collective negotiations and the settlement of grievances.

Included: Chief Wastewater Treatment Plant Operator, Chief Water Treatment Plant Operator, City Engineer, Director of Community and Economic Development, and Transportation Supervisor.

Excluded: Recreation Director and all other employees.

FURTHER, IT IS ORDERED that the above named public employer shall negotiate collectively with the United Public Service Employees Union. The duty to negotiate collectively includes the mutual obligation to meet at reasonable times and confer in good faith with respect to wages, hours, and other terms and conditions of employment, or the negotiation of an agreement, or any question arising thereunder, and the execution of a written agreement incorporating any agreement reached if requested by either party. Such obligation does not compel either party to agree to a proposal or require the making of a concession.

DATED: May 1, 2000
Albany, New York

Michael R. Cuevas, Chairman

Marc A. Abbott, Member

John T. Mitchell, Member

STATE OF NEW YORK
PUBLIC EMPLOYMENT RELATIONS BOARD

In the Matter of

UNITED PUBLIC SERVICE EMPLOYEES UNION,

Petitioner,

-and- **CASE NO. C-4944**

SEWANHAKA CENTRAL ELMONT, FLORAL PARK, FRANKLIN SQUARE AND NEW HYDE PARK CENTRAL HIGH SCHOOL DISTRICTS,

Employer,

-and-

SEWANHAKA EDUCATIONAL SUPPORT PERSONNEL NEA/NY,

Intervenor.

CERTIFICATION OF REPRESENTATIVE AND ORDER TO NEGOTIATE

A representation proceeding having been conducted in the above matter by the Public Employment Relations Board in accordance with the Public Employees' Fair Employment Act and the Rules of Procedure of the Board, and it appearing that a negotiating representative has been selected,

Pursuant to the authority vested in the Board by the Public Employees' Fair Employment Act,

IT IS HEREBY CERTIFIED that the United Public Service Employees Union has been designated and selected by a majority of the employees of the above-named

public employer, in the unit agreed upon by the parties and described below, as their exclusive representative for the purpose of collective negotiations and the settlement of grievances.

Included: All Building and Grounds classified custodial personnel (non-supervisory custodial personnel, full-time and steady part-time).

Excluded: All other employees.

FURTHER, IT IS ORDERED that the above named public employer shall negotiate collectively with the United Public Service Employees Union. The duty to negotiate collectively includes the mutual obligation to meet at reasonable times and confer in good faith with respect to wages, hours, and other terms and conditions of employment, or the negotiation of an agreement, or any question arising thereunder, and the execution of a written agreement incorporating any agreement reached if requested by either party. Such obligation does not compel either party to agree to a proposal or require the making of a concession.

DATED: May 1, 2000
Albany, New York

Michael R. Cuevas, Chairman

Marc A. Abbott, Member

John T. Mitchell, Member

STATE OF NEW YORK
PUBLIC EMPLOYMENT RELATIONS BOARD

In the Matter of

CIVIL SERVICE EMPLOYEES ASSOCIATION, INC., LOCAL 1000, AFSCME, AFL-CIO,

Petitioner,

-and-

CASE NO. C-4967

INCORPORATED VILLAGE OF OCEAN BEACH,

Employer.

CERTIFICATION OF REPRESENTATIVE AND ORDER TO NEGOTIATE

A representation proceeding having been conducted in the above matter by the Public Employment Relations Board in accordance with the Public Employees' Fair Employment Act and the Rules of Procedure of the Board, and it appearing that a negotiating representative has been selected,

Pursuant to the authority vested in the Board by the Public Employees' Fair Employment Act,

IT IS HEREBY CERTIFIED that the Civil Service Employees Association, Inc., Local 1000, AFSCME, AFL-CIO, has been designated and selected by a majority of the employees of the above-named public employer, in the unit agreed upon by the parties and described below, as their exclusive representative for the purpose of collective negotiations and the settlement of grievances.

Included: All full-time (i.e., more than 20 hours per week of regularly scheduled work on a year-round basis) employees in the following civil service titles: Administrative Assistant, Labor Crew Leader, Maintenance Mechanic II, Laborer, Water Meter Reader, Archivist, Second Deputy Clerk, Carpenter.

Excluded: All other employees.

FURTHER, IT IS ORDERED that the above named public employer shall negotiate collectively with the Civil Service Employees Association, Inc., Local 1000, AFSCME, AFL-CIO. The duty to negotiate collectively includes the mutual obligation to meet at reasonable times and confer in good faith with respect to wages, hours, and other terms and conditions of employment, or the negotiation of an agreement, or any question arising thereunder, and the execution of a written agreement incorporating any agreement reached if requested by either party. Such obligation does not compel either party to agree to a proposal or require the making of a concession.

DATED: May 1, 2000
Albany, New York

Michael R. Cuevas, Chairman

Marc A. Abbott, Member

John T. Mitchell, Member

STATE OF NEW YORK
PUBLIC EMPLOYMENT RELATIONS BOARD

In the Matter of

TEAMSTERS LOCAL #264, INTERNATIONAL BROTHERHOOD OF TEAMSTERS,

Petitioner,

-and- **CASE NO. C-4979**

VILLAGE OF ALLEGANY,

Employer.

CERTIFICATION OF REPRESENTATIVE AND ORDER TO NEGOTIATE

A representation proceeding having been conducted in the above matter by the Public Employment Relations Board in accordance with the Public Employees' Fair Employment Act and the Rules of Procedure of the Board, and it appearing that a negotiating representative has been selected,

Pursuant to the authority vested in the Board by the Public Employees' Fair Employment Act,

IT IS HEREBY CERTIFIED that Teamsters Local #264, International Brotherhood of Teamsters, has been designated and selected by a majority of the employees of the above-named public employer, in the unit agreed upon by the parties and described below, as their exclusive representative for the purpose of collective negotiations and the settlement of grievances.

Included: All full-time and regular part-time Department of Public Works employees.

Excluded: All other employees.

FURTHER, IT IS ORDERED that the above named public employer shall negotiate collectively with Teamsters Local #264, International Brotherhood of Teamsters. The duty to negotiate collectively includes the mutual obligation to meet at reasonable times and confer in good faith with respect to wages, hours, and other terms and conditions of employment, or the negotiation of an agreement, or any question arising thereunder, and the execution of a written agreement incorporating any agreement reached if requested by either party. Such obligation does not compel either party to agree to a proposal or require the making of a concession.

DATED: May 1, 2000
Albany, New York

Michael R. Cuevas, Chairman

Marc A. Abbott, Member

John T. Mitchell, Member